

Denver Law Review Forum

Volume 94

Article 15

1-12-2017

The New "Bright Line" Rule in Condemnation Commission Trials: Regional Transportation District v. 750 W 48th Ave., LLC

Jody Harper Alderman

Follow this and additional works at: <https://digitalcommons.du.edu/dlrforum>

Recommended Citation

Jody Harper Alderman, The New "Bright Line" Rule in Condemnation Commission Trials: Regional Transportation District v. 750 W 48th Ave., LLC, 94 Denv. L. Rev. F. (2017), available at <https://www.denverlawreview.org/dlr-online-article/2017/1/12/the-new-bright-line-rule-in-condemnation-commission-trials-r.html>

This Case Comment is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review Forum by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

THE NEW “BRIGHT LINE” RULE IN CONDEMNATION
COMMISSION TRIALS: *REGIONAL TRANSPORTATION
DISTRICT V. 750 W 48TH AVE., LLC*

JODY HARPER ALDERMAN[†]

In Colorado, when an entity exercises its eminent domain power, a property owner who owns private property that is being acquired may elect to have a jury or a commission of three freeholders determine the amount of just compensation due to the property owner for the taking of the property.¹ If the property owner elects a commission to determine value, the valuation trial is a hybrid model. A presiding judge supervises the pre-trial process, hears *in limine* motions, issues commission instructions, and might be involved in evidentiary decisions during the valuation trial.² The commission receives the evidence and makes decisions on evidentiary objections during the valuation trial—unless the commission requests the judge to assist in those decisions—and ultimately decides just compensation.³ The roles and responsibilities of the judge and the commission seem to overlap, but, recently, the Colorado Supreme Court in *Regional Transportation District v. 750 West 48th Ave., LLC*, promulgated a “bright line rule” defining the authority of the judge vis á vis the commission in condemnation cases.⁴ We now know that the trial court judge is the ultimate authority in a valuation trial to a commission.

Colorado’s eminent domain statutes lay out the respective duties and authority of the commission and the trial court. The trial court has broad powers to determine “all questions and issues, except the amount of compensation.”⁵ Before the valuation trial, the judge is responsible for administering an oath to the commissioners and instructing them as to their duties.⁶ The court also may rule on pretrial motions.⁷ At the conclusion of testimony, the judge must instruct the commissioners as to the

[†] Jody Harper Alderman, Esq., is a member of the firm Alderman Bernstein LLC in Denver, Colorado. She received her Juris Doctor degree from the University of Colorado School of Law in 1994. She has practiced law for more than 20 years, primarily in the areas of real estate related litigation, including eminent domain law, and real estate transactions. She frequently presents at continuing legal education seminars on the topic of eminent domain.

1. Colo. Rev. Stat. §38-1-101(2)(a) (explaining that, alternatively, all parties may stipulate that compensation may be ascertained by the court); Colo. Rev. Stat. § 38-1-105(1); Colo. Rev. Stat. § 38-1-106.

2. § 38-1-105(1).

3. Colo. Rev. Stat. § 38-1-105(2).

4. *Regional Transportation District v. 750 West 48th Ave., LLC*, 357 P.3d 179 (Colo. 2015)

5. § 38-1-101(2)(a).

6. § 38-1-105(1).

7. *See, e.g., State Dep’t of Highways v. Town of Silverthorne*, 707 P.2d 1017, 1019 (Colo. App. 1985).

“applicable and proper law to be followed by them in arriving at their ascertainment [of value].”⁸

The commission’s role is to ascertain the amount of just compensation for the property taken.⁹ Commissioners “shall hear the proofs and allegations of the parties according to the rules of evidence, and, after viewing the premises or other property,” shall ascertain and certify the proper compensation and damages, if any, to be awarded to the landowner.¹⁰ In the course of receiving the evidence, the commission “may request the court to make rulings on the propriety of the proof or objections of the parties.”¹¹ However, the commission is empowered to make evidentiary rulings during the course of the trial.¹²

Typically, the trial court judge does not preside during a valuation trial to a commission. The only requirements for a commissioner are he or she must be a freeholder who is impartial and unbiased.¹³ By statute, a commission is not required to include a lawyer or retired judge, but, in practice, almost always does.

In *Regional Transportation District v. 750 West 48th Ave., LLC*, RTD filed its petition in condemnation to acquire by its power of eminent domain the entire property owned by the property owner, 750 W. 48th Ave, LLC. The valuation trial was before a commission.

In advance of the valuation trial, the landowner filed a motion *in limine* seeking a pretrial ruling to exclude certain evidence that RTD intended to introduce through one of its rebuttal expert witnesses, a real estate broker. The judge granted the motion in part, but denied the motion regarding certain testimony from the broker, concluding it was admissible in evidence.¹⁴

After testimony from appraisers on both sides and several other expert witnesses at the trial to the commission, RTD called its broker to testify as a rebuttal expert witness. In the course of the broker’s testimony, when he was asked a question that would elicit the evidence the property owner had previously challenged *in limine* and the judge deemed admissible, property owner’s counsel renewed the objection, arguing the evidence was irrelevant to the value of the property. The commission sustained the objection and excluded the testimony, reversing the trial court judge’s pretrial ruling.¹⁵

8. § 38-1-105(1).

9. § 38-1-101(2)(a); *Goldstein v. Denver Urban Renewal Authority*, 560 P.2d 80, 82 (Colo. 1977).

10. § 38-1-105(2).

11. *Id.*

12. *State Dep’t of Highways v. Mahaffey*, 697 P.2d 773, 776 (Colo. App. 1984).

13. § 38-1-101(2)(a); § 38-1-105(1).

14. 357 P.3d 179 at 181.

15. *Id.*

The commission also admitted evidence during the valuation trial regarding certain property to which the tenant in the subject property was going to relocate. During arguments to the judge on commission instructions, the property owner's counsel proposed an instruction directing the commission not to consider such evidence because it was irrelevant to value. The trial court gave the instruction to the commission.¹⁶

RTD appealed both of these issues to the Court of Appeals.¹⁷ The Court of Appeals, after a review of the applicable eminent domain statutes, concluded there was no error and affirmed. In reaching its conclusion with regard to the commission reversing the judge's pretrial ruling admitting the particular rebuttal testimony, the Court of Appeals relied on case law that permitted a trial court to modify pretrial rulings during the course of trial.¹⁸ The Court of Appeals further concluded the commission did not abuse its discretion because the witness was a rebuttal witness and, as such, his testimony was properly limited to the appraisal approach utilized by the direct expert witnesses.¹⁹

The Court of Appeals found that the trial court's instruction on the relevancy of the evidence constituted a legal issue and held that "[b]ecause section 38-1-105(1) requires the trial court to instruct the commission on the applicable law, the court properly instructed the commission how to determine the reasonable value of the property."²⁰

RTD petitioned the Colorado Supreme Court for certiorari review on both evidentiary issues: (1) Whether a commission may alter a supervising judge's ruling *in limine* regarding admissibility; and (2) whether the supervising judge may instruct the commission to disregard as irrelevant evidence that the commission had previously admitted.²¹

The Colorado Supreme Court granted certiorari and reversed on one issue while affirming on the other. Underlying the entire decision is the Supreme Court's conclusion that judicial evidentiary rulings control in valuation hearings. The Supreme Court established this as "bright line

16. *Id.*

17. *Regional Transportation District v. 750 West 48th Ave., LLC*, 369 P.3d 640 (Colo. App. 2013). RTD also appealed the trial court's decision not to disqualify a certain commissioner, contending the standard for disqualification of a commissioner should be the same as that of a judge, such that even the appearance of impropriety would disqualify a commissioner, relying primarily on *State Dep't of Highways v. Copper Mountain, Inc.*, 624 P.2d 936, 937 (Colo. App. 1981). *Id.* at 643-44. The Court of Appeals affirmed the trial court, finding that the plain meaning of the statute requires that a commissioner be, in fact, interested and partial to be disqualified. *Id.* at 644-45. The Court of Appeals went on to find that the challenged commissioner was not in fact interested and partial, because neither the *voir dire* nor RTD's motion established that she had participated in the other RTD cases where others in her company had testified, or that she had a personal interest, financial or otherwise, in the outcome of this case. *Id.*

18. *Id.* at 646-48.

19. *Id.* at 648.

20. *Id.* at 646.

21. 357 P.3d at 180.

rule.”²² In applying the bright line rule, the Court reversed the first issue and affirmed the second.²³

The Supreme Court’s opinion clarifies the relationship between the commission and the judge in eminent domain valuation hearings, boiling it down to the “simple maxim: judicial evidentiary rulings control over commission evidentiary rulings.”²⁴ Specifically, the Court ruled that:

(1) If the judge has not ruled on the evidence, the commission may do so without consulting the judge;²⁵

(2) The implicit power of the commission to make evidentiary rulings is necessarily subsidiary to judicial rulings;²⁶ and

(3) The irrelevance of a particular piece of evidence admitted by the commission is precisely the type of issue within the judge’s instructional purview.²⁷

With regard to *in limine* rulings, the Supreme Court explained that if the judge rules on a motion *in limine* to exclude or admit the evidence, the commission does not have the authority to alter that ruling. The commission may request the judge revisit and modify the ruling.²⁸ The Court also explained that the judge is not required to make a definitive ruling on motions *in limine*, and she may decline to rule, leaving it to the commission to decide.²⁹

In *Regional Transportation District v. 750 West 48th Ave., LLC*, the Supreme Court clarified the roles of the commission and the judge in a valuation trial in eminent domain cases in a way that makes sense and is consistent: the trial court judge is the ultimate authority in a valuation trial. This bright line rule will assist all practitioners trying condemnation cases. It may change strategy decisions regarding filing *in limine* motions, because now we know that pre-trial evidentiary rulings may only be reconsidered, modified, or reversed by the trial court judge herself, not the commission who is hearing the evidence. It may also increase the

22. *Id.* at 184.

23. *Id.* Following a Motion for Reconsideration by the property owner requesting the Supreme Court to find the exclusion of the broker’s testimony was harmless error, which was denied, the Supreme Court remanded to the Court of Appeals for further proceedings consistent with the Supreme Court’s opinion. In the Court of Appeals, the property owner filed a Motion for Determination of Harmless Error, which was denied, and the case was remanded to the trial court for further proceedings consistent with the opinion of the Supreme Court and the Court of Appeals, and an Order Re Remand was entered instructing the trial court how it proceed. On a motion of the property owner, the trial court reconsidered and reversed its *in limine* ruling that admitted the broker’s testimony, finding, rather, that it was proper to exclude it. The trial court re-affirmed the original ascertainment of value of the commission.

24. *Id.* at 183.

25. *Id.*

26. *Id.*

27. *Id.* at 185.

28. *Id.* at 184.

29. *Id.*

number of special instructions practitioners seek in commission trials. Regardless, it provides a definitive division of authority between a judge and a commission in eminent domain trials.